Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:POSTF-164265-01
JMMarr

date: APR 30 2002

to: Examination Division, Group [redacted]
Attention: [redacted], Team Manager
[redacted] Team Coordinator

from: June Y. Bass, Associate Area Counsel, LMSB
Joyce M. Marr, Attorney

subject: **Taxpayers: [redacted] Inc.**
EIN: [redacted]
Issue: Validity of statute extension for [redacted]
Statute of Limitations: [redacted]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated November 21, 2001. This memorandum should not be cited as precedent.

ISSUE

Whether a Form 872 (Consent to Extend the Time to Assess Tax) executed to extend the statute of limitations for the [redacted], Inc. consolidated group that is captioned "[redacted] Inc. (EIN [redacted]) successor in interest to [redacted] Inc. (EIN [redacted])*" is valid for the tax year ended December 31, [redacted]?

CONCLUSION/RECOMMENDATIONS

, (b)(7)a, (b)(5)(AC), (b)(5)(DP) [redacted]

20094

FACTS[1]

--Corporate Restructurings

[redacted], Inc. ("old-[redacted]"; EIN [redacted]) was a common parent of a consolidated group. [redacted] Corporation ("[redacted]") was a common parent of another consolidated group.

On [redacted], [redacted], Inc. ("old-[redacted]") was merged into [redacted], Inc. (a wholly-owned subsidiary of [redacted]), which immediately changed its name to [redacted], Inc. ("new-[redacted]").

During [redacted], old-[redacted] formed 3 corporations: (1) [redacted], Inc. (EIN [redacted]); (2) [redacted] Corp., a wholly-owned subsidiary of [redacted], Inc.; and (3) [redacted] Corp., also a wholly-owned subsidiary of [redacted], Inc.

On [redacted], two reorganizations took place: (1) [redacted] Corp. was merged into old-[redacted]; and (2) [redacted] Corp. was merged into [redacted] such that old-[redacted] and [redacted] became wholly-owned subsidiaries of [redacted], Inc.[2]

On or before [redacted], [redacted] Inc. changed its name to [redacted], Inc. ("new-[redacted]"; same EIN as [redacted], Inc.) and old-[redacted] changed its name to [redacted], Inc.

On [redacted] [redacted] Corporation, a wholly-owned subsidiary of new-[redacted], changed its

---

[1] The facts stated herein are based on the documents and information Exam has provided. We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

[2] On [redacted], the respective shareholders of old-[redacted] and [redacted] received shares of [redacted], Inc. in conjunction with a simultaneous merger of [redacted] Corporation into old-[redacted] and a simultaneous merger of [redacted] into [redacted]. These reorganizations were treated as section 351(a) transactions in which the respective shareholders of [redacted] and old-[redacted] transferred their stock to [redacted], Inc. in exchange for stock in [redacted], Inc. followed by the aforesaid mergers.

name to [redacted], Inc. ("[redacted]").

On [redacted], new-[redacted] merged into [redacted].

Effective [redacted], [redacted] was merged downstream into [redacted]. [redacted] thereby became and still is a wholly-owned first tier holding company of new-[redacted]. Also, effective [redacted], [redacted] Inc. (i.e., old-[redacted]) was merged into [redacted].

Attached hereto as Exhibit A are various organizational charts.

Exam was aware of the various structural changes discussed above by at least [redacted]. See the copy of an advisory opinion attached hereto as Exhibit B, which is dated May 31, 2000.

-- <u>Tax returns for tax years [redacted] through [redacted], inclusive</u>

Old-[redacted] (name: "[redacted], Inc. & Subsidiaries"; EIN [redacted]) filed consolidated income tax returns for the tax years ended September 30, [redacted], September 30, [redacted], September 30, [redacted], and December 31, [redacted].[3] For the year ended December 31, [redacted] new-[redacted] (name: "[redacted], Inc. & Subsidiaries;" EIN [redacted]) filed a consolidated income tax return (as indicated above, old-[redacted] was a wholly-owned subsidiary of new-[redacted] during the year ended December 31, [redacted]). Thus, all the returns for the years ended September 30, [redacted], through December 31, [redacted], inclusive, are captioned with the exact same name, but the return for the year ended December 31, [redacted], shows the EIN for new-[redacted] in the block on the first page of the return labeled "Employer identification number."

On [redacted], [redacted], who was then with the public accounting firm [redacted], executed the [redacted] consolidated income tax return of new-[redacted] as "preparer." A copy of the first page of this tax return is affixed hereto as Exhibit C. The [redacted] tax return was filed with the Service on September 17, [redacted].

---

[3] The taxpayer filed a Form 1128, Application to Adopt, Change or Retain a Tax Year to change its year-end from September 30 to December 31. Permission was granted by the Service, and the taxpayer filed a short-year return for the period October 1, [redacted], to December 31, [redacted].

-- Form 872 for [redacted] through [redacted] inclusive

In [redacted], the Service secured a Form 872, Consent to Extend the Time to Assess Tax, captioned as "[redacted], Inc. (EIN [redacted]) successor in interest to [redacted] Inc. (EIN [redacted])*" for the periods ended September 30, [redacted], September 30, [redacted], September 30, [redacted], December 31, [redacted], and December 31, [redacted].

The Form 872 was signed by [redacted], as the Vice-President of Tax for [redacted]. A copy of the Form 872 is affixed hereto as Exhibit D. During a meeting held with IRS Field Counsel on [redacted] IRS Exam Team Coordinator [redacted] related her recollection of how the Form 872 was secured as follows. [redacted] took the Form 872 to [redacted]'s office for signature. When she submitted the Form 872 executed by [redacted] on [redacted], to then Exam Team Manager [redacted], [redacted] noticed that no name had been inserted on the line in the signature block for the "Corporate Name." [redacted] therefore instructed [redacted] to return the Form 872 to the taxpayer for the taxpayer to insert the "Corporate Name." On [redacted], [redacted] returned with the Form 872, which was executed by [redacted], to the taxpayer's office where the Tax Manager for new-[redacted], [redacted], wrote in the name "[redacted], Inc." on the line labeled "Corporate Name." However, new-[redacted] has represented to [redacted] that [redacted] has been the Vice President -- Taxes and Treasurer of new-[redacted] since he left [redacted] and joined the new-[redacted] consolidated group.

[redacted] executed the Form 872 on behalf of the Service on [redacted]. The administrative file contains no copies of any correspondence soliciting the Form 872.

New-[redacted] claims that the Form 872 secured in [redacted] is invalid insofar as it pertains to the tax year [redacted] because of the improper caption for such year. It further claims that, accordingly, the statute of limitations for assessment expired for [redacted] on [redacted].[4]

Taxpayer's understanding as to the years under audit

When [redacted] executed the Form 872 in question, he and the taxpayer were aware that the tax years under audit are those ended September 30, [redacted], September 30, [redacted], September 30, [redacted]

[4] No other consents have been secured to extend the statute of limitations on assessment against the new-[redacted] consolidated group for the tax year [redacted].

December 31, [redacted] and December 31, [redacted], as evidenced by: (1) a letter of authorization dated [redacted] from [redacted] as Vice President - Tax on new-[redacted] letterhead (a copy of which is affixed hereto as Exhibit E); (2) a letter from the Tax Manager for new-[redacted], [redacted], transmitting the letter of authorization (a copy of which is affixed hereto as Exhibit F); and (3) a letter dated [redacted], from [redacted] as Vice President of Tax on new-[redacted] letterhead transmitting disclosures permitted under I.R.C. § 6662 (a copy of which is affixed hereto as Exhibit G).

DISCUSSION

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a).

Generally, the Service must make an assessment of tax within three years after a return is filed. I.R.C. § 6501(a). However, before the period for making an assessment expires, the Service and the taxpayer may consent in writing to extend the period for making an assessment. I.R.C. § 6501(c)(4).

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41 , 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165 , 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other duly authorized officer.

--Reformation

[redacted] , (b)(7)a, (b)(5)(AC), (b)(5)(DP)

, (b)(7)a, (b)(5)(AC), (b)(5)(DP) [redacted]

The equitable remedy of reformation stated in Woods v. Commissioner, 92 T.C. 776 (1989) is available to cure the defect (new common parent's name (New-[redacted]) not properly captioned) on the Form 872 for tax year [redacted].

Reformation is an equitable remedy used to reform written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing is unambiguous but misstates the parties' intent. U.S. v. Lumbermens Mutual Casualty Co., 917 F.2d 654, 658 (1st Cir. 1990); Rocanville Corp. v. Natural Gas Pipeline Co., 823 F.2d 92, 94 (5th Cir. 1987).

A consent to extend the period of limitations is essentially a unilateral waiver of a defense by the taxpayer and is not a contract. Stange v. United States, 282 U.S. 270 (1931); Kelley v. Commissioner, 45 F.3d 348, 350 n.4 (9th Cir. 1995); Piarulle V. Commissioner, 80 T.C. 1035, 1042 (1983). Contract principles are significant, however, because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle, 80 T.C. at 1042. The term "agreement" means a manifestation of mutual assent. Id. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

The Tax Court has the equitable power to reform a consent to conform to the parties' intention. Woods v. Commissioner, supra. In Woods, the consents contained mistakes in the taxpayer's name and EIN. The name provided on the form was "Solar Environments, Inc." rather than "Solar Equipment, Inc." and the EIN was shown as "43-1156200" rather than "43-1156196." The Tax Court permitted the document to be reformed because the incorrect language was the product of a mutual mistake. The Tax Court noted that reformation is not precluded merely because the mistake originated with the Service. The Tax Court stated that in order to reform a Form 872 there must be "clear and convincing evidence" as to the parties' intent.

The Woods principle cannot be extended to create authority that never existed in the first place. Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661. However, in this case, as Treasurer of new-[redacted], [redacted] had the authority to act for new-[redacted] to extend the statute of limitations.

, (b)(7)a, (b)(5)(AC), (b)(5)(DP) [redacted]

, (b)(7)a, (b)(5)(AC), (b)(5)(DP)

[redacted]

, (b)(7)a, (b)(5)(AC), (b)(5)(DP)

[redacted]

, (b)(7)a, (b)(5)(AC), (b)(5)(DP) [redacted]

, (b)(7)a, (b)(5)(AC), (b)(5)(DP) [redacted].

Our advice has been coordinated with the Office of Chief Counsel pursuant to the NSAR pre-review procedures. If you have any questions, please contact attorney Joyce M. Marr at 949-360-2688.

Exhibits:

- Exhibit A: various organizational charts
- Exhibit B: advisory opinion dated May 31, 2000
- Exhibit C: 1st page of new-[redacted]'s [redacted] income tax return
- Exhibit D: Form 872 executed in [redacted]
- Exhibit E: letter of authorization
- Exhibit F: letter transmitting the letter of authorization
- Exhibit G: letter transmitting I.R.C. § 6662 disclosures